In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 108

ELLIOT L. RICHARDSON, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, PETITIONER

v.

PEDRO PERALES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

We submit this reply brief to respond (1) to the contention of the *amicus curiae* American Bar Association that the Administrative Procedure Act, rather than the Social Security Act, establishes the procedure to be followed at administrative hearings of claims for disability benefits filed under the Social Security Act; and (2) to the contention of the respondent and the *amicus* Legal Aid Association that, in a variety of particulars, the hearing procedure by which disability claims are determined is invalid on due process grounds.

412-817—70

1. In our opening brief, we relied on the provisions of the Social Security Act and the regulations of the Secretary promulgated thereunder as validly authorizing the procedure presently utilized in the conduct of hearings of social security disability claims. The *amicus* American Bar Association contends, however, that the Administrative Procedure Act (5 U.S.C. 551, 556), rather than the Social Security Act, governs the conduct of hearings under the Social Security Act. The ABA recognizes that the two Acts do not conflict with respect to the issues now presented (Brief, p. 8), but expresses concern over "the complete denial of access to the rights assured by the APA implicit in" our argument (Brief, p. 5). As we show below, however, the broad question of the general applicability of the Administrative Procedure Act to hearings of disability claims under the Social Security Act is of no consequence here. For, assuming its applicability, the Administrative Procedure Act specifically authorizes the procedures which the Secretary follows under the Social Security Act. This is not surprising, since the Social Security Act furnished the model upon which the Administrative Procedure Act was based. See Final Report of the Attorney General's Committee on Administrative Procedure (reprinted as S. Doc. 8, 77th Cong., 1st Sess.), p. 157.

The section of the Administrative Procedure Act dealing with the procedure at hearings (5 U.S.C. 556) provides that "[a]ny oral or documentary evidence may be received" and, with particular significance here, that "[i]n * * * determining claims for money or bene-

fits * * * an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form." 5 U.S.C. 556(d). That same subsection also provides that "[a] party is entitled * * * to conduct such cross-examination as may be required for a full and true disclosure of the facts."[1] Taken together, these provisions confirm, rather than supersede, the authority given to the Secretary by the Social Security Act. They are, in effect, an additional authorization of the procedures adopted by him.

Thus, in specifically authorizing an agency "determining claims for money or benefits" to "adopt procedures" for the submission of evidence in written form, the Administrative Procedure Act leaves standing the power vested in the Secretary by the Social

[1] In full, 5 U.S.C. 556(d) provides:

> Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rulemaking or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

Security Act to "'establish procedures'' and "provide for the nature and extent of the proofs and evidence" (42 U.S.C. 405(a)) free from the "rules of evidence applicable to court procedure" (42 U.S.C. 405(b)). Moreover, while the Administrative Procedure Act limits the exercise of the authority to receive evidence in written form to circumstances in which a party "will not be prejudiced thereby," and preserves a party's right to conduct such cross-examination "as may be required for a full and true disclosure of the facts," the procedures established by the Secretary accord full recognition to, and are fully consistent with, those limitations. Specifically, as we explained in our opening brief, the Secretary's regulations permit the introduction of written medical reports while preserving the right of cross-examination "[w]hen reasonably necessary for the full presentation of a case." 20 C.F.R. 404.926.

Consequently, as the American Bar Association's brief recognizes, the Secretary's exercise of his authority under the Social Security Act does not conflict with the provisions of the Administrative Procedure Act. While the court below held the Administrative Procedure Act inapplicable to the conduct of hearings under the Social Security Act on the ground that 5 U.S.C. 556(b) states that the entire administrative procedure subchapter (5 U.S.C. 551–559) "does not supersede the conduct of specified classes of proceedings, in whole or in part by or before boards or other employees specifically provided for by or desig-

nated under statute" (App. 42), there is no occasion for this Court here to consider the correctness of that broad ruling.

2. The respondent asserts (Brief, pp. 23–27) that hearing examiners function both as judges and as counsel for the Social Security Administration with "the responsibility of * * * seeking to make the Government's case as strong as possible" (Brief, p. 25). He then argues that claimants are thereby denied a fair hearing of their disability claims and that a modification of the present procedure to provide for the appointment of an independent hearing examiner is necessary.

We note, first, that this contention seeks relief in addition to, and of a different character from, that awarded the respondent by the court of appeals. Since respondent did not file a cross-petition for a writ of certiorari on this issue, and since this question is not fairly encompassed within the grant of certiorari, it is not properly before this Court. *Radio Officers* v. *National Labor Relations Board*, 347 U.S. 17, 37 n. 35.

At all events, respondent's argument is based on an erroneous conception of the role of the hearing examiner. Although hearing examiners function as judges, they do not act as counsel for the government. Their role is not to gather evidence in support of the "government's case," but to develop all the relevant evidence bearing on the claimant's condition, whether favorable or unfavorable, so that all the facts are before them when they make their decision. The basic fairness of this system is shown by the statistic,

relied on by the *amici* Appalachian Research Fund et al. (Brief, p. 23), that hearing decisions—which almost exclusively concern only those cases in which the state agency did not grant benefits (see 42 U.S.C. 421(c))—favor claimants 44.2 percent of the time.[2]

Respondent's reliance on *Goldberg* v. *Kelly*, 397 U.S. 254, is misplaced. *Goldberg* involved the termination of welfare benefits in circumstances in which the claimant was completely foreclosed both from making an oral presentation and from confronting or cross-examining adverse witnesses. Against that background, and in circumstances "where credibility and veracity are at issue" (397 U.S. at 269), this Court required that the claimants be given the "effective opportunity" to confront any adverse witnesses (397 U.S. at 268).

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[2] The respondent seems to seek, in place of the present informal system, a full-blown adversary procedure. For if there were an "independent hearing examiner" who would not gather evidence, there would necessarily also have to be a government attorney who would attempt to develop evidence to disprove the claim. (Hearings of claims under the Longshoremen's and Harbor Workers' Compensation Act, which the respondent believes provide an appropriate procedure, involve competing presentations by the claimant and the employer or its insurer and result, when the employee prevails, in a judgment against the employer or its insurer.) The establishment of such a procedure, whereby competing presentations would be made by the claimant on the one hand and by the government on the other, would scarcely be beneficial to claimants, many of whom are not represented by counsel, and would add substantially to the administrative costs borne by the trust fund. Most importantly, it would be contrary to the congressional intent to provide a simple procedure whereby claimants can establish their right to benefits.

The situation here is entirely different. In the first place, written medical reports do not ordinarily involve questions of credibility and veracity. Even more important, the reports are disclosed to the claimants who are then presented with the "effective opportunity" through the use of a subpoena to cross-examine their authors. All that is required is that the claimant exercise that opportunity by stating reasons why, in the particular case, cross-examination is needed. In these circumstances, the court below correctly held that the claimant could not complain of the "denial" of the right to cross-examination when he had failed to take the steps required to implement that right (App. 43–44). For the reasons stated in our opening brief, however, it should also have held that the reports, even though technically "hearsay," can constitute a sufficient basis for an administrative determination when their content warrants it.

Respectfully submitted.

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